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CONFIDENTIAL SETTLEMENT COMMUNICATION

June 1, 2016

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New Jersey Superfund Branch
Office of Regional Counsel
U.S. Environmental Protection Agency, Region 2
290 Broadway, 17th Floor
New York, New York 10007-1866

Re: Lower Passaic River/Remedial Design: Freedom of Information Act Issues

Dear Juan:

The purpose of this letter is to follow up on our discussions regarding information and communications on the draft Remedial Design Administrative Settlement and Order on Consent ("RD AOC") and draft Statement of Work ("SOW") exchanged between U.S. EPA Region 2 and my clients Occidental Chemical Corporation ("OxyChem"), Maxus Energy Corporation ("Maxus"), and Tierra Solutions, Inc. ("Tierra"). In particular, we are concerned about future disclosure of settlement communications regarding the remedial design for the Lower 8.3 Miles of the Lower Passaic River between my clients and the Agency under the Freedom of Information Act ("FOIA") given the confidential nature of our communications and significant potential harm resulting from disclosure.[1]

This concern relates to a limited subset of communications to be exchanged between my clients (or on their behalf) and the applicable government entities solely related to negotiation of an agreement(s) for the funding and/or performance of the OU-2 Remedial Design and involving the details of such negotiation while those issues are open, particularly (although not exclusively) during the period of active negotiations. We do not have confidentiality concerns regarding communications related to the identity of other major parties or those that merely reflect that negotiations are occurring.

[1] We understand, for example, that the Lower Passaic River Study Area Cooperating Parties Group has submitted a FOIA request to Region 2 for recent correspondence on behalf of my clients with the Region, and that the Region intends to release this letter under FOIA.

For example, in a letter dated May 11, 2016, the outside counsel for Givaudan Fragrances Corporation—admittedly inaccurately—claimed that Region 2's correspondence demonstrated that it had determined that "OCC, and OCC alone, is responsible for the RD process."[2] Another party, Quality Carriers, has made use of Region 2's March 31, 2016 correspondence to suggest that Region 2 has determined that it is "more appropriate" for the CPG members to coordinate with my clients in the context of discussions regarding the remedial action—a position Quality Carriers took after Region 2's April 26 letter clarified that it encouraged my clients to contact major PRPs regarding financial participation in the remedial design.[3] It is evident that the other major parties intend to closely scrutinize any written communications exchanged in negotiations regarding the remedial design and attempt to misuse those communications to justify recalcitrance and disrupt negotiations, an outcome that is not in the interest of my clients, of Region 2, or of the public as a whole.

Further, it is our view that withholding records relating to settlement communications with Region 2 from FOIA disclosure is warranted and necessary to protect the interests of the government, public, and my clients in expeditious resolution of the RD AOC and SOW. We would like to discuss the Region's position on FOIA in further detail and explore a framework to safeguard settlement communications from disclosure as soon as is practicable.

There is a Judicially Recognized Interest in Protecting Settlement Communications in CERCLA Matters from FOIA Disclosure

The strong public interest in assuring the confidentiality of settlement negotiations for matters under the Comprehensive Environmental Response, Compensation, and Liability Act ("CERCLA") has been recognized by the U.S. Court of Appeals for the Second Circuit. In U.S. v. Glen Falls Newspapers, 160 F.3d 853, 858 (2d Cir. 1998), the Second Circuit held that settlement communications between General Electric Company, the U.S. EPA, and New York State regarding the Caputo/Moreau Superfund site in Moreau, New York should be protected from disclosure under the state's analog to FOIA, the New York Freedom of Information Law.

Much like the Lower Passaic River, the CERCLA matter in Glen Falls involved negotiation of a "complex, global settlement" where "numerous engineering alternatives

[2] Letter from William S. Hatfield (Gibbons P.C.) to Derrick Vallance (May 11, 2016).
[3] Letter from Bonni Kaufman (Holland & Knight, LLP) to Ben Lippard (May 13, 2016).

presently being considered by the parties are complex and expensive."[4] The Court recognized that for resolution of such CERCLA actions, "opening settlement negotiations . . . prior to the crafting of a tentative agreement would not be in the public interest, nor required by the Constitution or laws."[5] Although Glen Falls involved a request under the New York Freedom of Information Law, the imperatives requiring confidential treatment of the CERCLA settlement communications articulated by the Second Circuit apply to communications between my clients and Region 2.

FOIA's Exemptions Provide a Basis for Withholding Records Relating to Settlement Communications Regarding the RD AOC and SOW

Against the backdrop of the vital judicially recognized protections for CERCLA settlement communications, there are at least two specific exemptions from disclosure under FOIA that provide a basis for withholding certain settlement communications with Region 2 regarding the RD AOC and SOW.

The enumerated exemptions under FOIA include an exemption for "trade secrets and commercial or financial information obtained from a person and privileged and confidential." ("Exemption 4"). Exemption 4 has been specifically held as a basis to withhold settlement communications from disclosure.[6] It is likely that settlement communications between my clients and Region 2 will fall under this exemption, particularly to the extent that these communications involve financial information, discussions regarding the potential costs of funding and performing the work, and the opinions of my clients' technical personnel regarding the details of the SOW, which we view as proprietary information. This is precisely the type of information that my clients would customarily treat as confidential and proprietary and would not expect to be disclosed to the public. Importantly, withholding

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[4] 160 F.3d at 855.

[5] Id. at 856,

[6] See M/A-COM Info. Sys. V. HHS, 656 F. Supp. 691, 692 (D.D.C. 1986) (applying settlement privilege under FOIA Exemption 4 for drafts containing information in which company "would properly have a commercial interest"; stating that "it is in the public interest to encourage settlement negotiations in matters of this kind and it would impair the ability of HHS to carry out its government duties if disclosure of this kind of material under FOIA were required").

records under Exemption 4 is generally viewed as *mandatory*, rather than discretionary on the Agency's part.[7]

FOIA also provides an exemption from disclosure for "inter-agency and intra-agency memoranda or letters which would not be available by law to a party other than an agency in litigation with the agency" ("Exemption 5").[8] Although Exemption 5 is typically associated with the attorney-client, work-product, and deliberative process privileged materials, courts have construed Exemption 5 to embody recognized civil discovery privileges.[9] Moreover, agencies are generally considered to have discretion with implementation of Exemption 5, and thus it would be appropriate to withhold records relating to the RD AOC and SOW under Exemption 5 under the circumstances in our matter.[10] Records properly withheld under Exemption 5 that relate to negotiation of the RD AOC and SOW would likely include much information to be provided by my clients, for example, settlement positions, technical proposals, and government evaluation of that information.

The Settlement Communications Records Here Represent a Unique Class of Records Whose Withholding is Necessary to Prevent Harm

FOIA requests concerning enforcement matters may seek records regarding specific types of concluded enforcement matters, data regarding enforcement cases and pollutant reductions, and even information regarding high-profile matters. But FOIA requests for my client's settlement communications records with Region 2 are an entirely different species: they seek "real time" confidential settlement communications *during* ongoing negotiation of a matter with a very long timeline that is subject to intense public scrutiny. Records typically sought under FOIA, even FOIA requests concerning other enforcement matters, simply do

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[7] See Department of Justice Guide to the Freedom of Information Act, Discretionary Disclosure at 3-4 (Dec. 8, 2014) ("agencies are constrained in their ability to make discretionary disclosures of records covered by" Exemption 4).

[8] Id. § 552(b).

[9] See U.S. v. Weber Aircraft Corp. 465 U.S. 792, 799-900 (1984); FTC. Grolier Inc., 462 U.S. 19, 26-27 (1983); Burka v. HHS, 87 F.3d 508, 516 (D.C. Cir. 1996) (stating that Exemption 5 "incorporates . . . generally recognized civil discovery protections"). A "settlement privilege" has been judicially recognized, and as a separate matter, Federal Rule of Evidence 408 restricts the admissibility of evidence of certain communications regarding settlement. See *Goodyear Tire & Rubber Co. v. Chiles Power Supply Inc.*, 332 F.3d 976, 980 (6th Cir. 2003) (recognizing, in non-FOIA case, a settlement negotiation privilege, which "fosters a more efficient, more cost-effective, and significantly less burdened judicial system").

[10] See Department of Justice Guide to the Freedom of Information Act, Discretionary Disclosure at 6.

not present the panoply of concerns raised by FOIA requests for Lower Passaic River settlement records.

Indeed, disclosing settlement communications with Region 2 makes them susceptible to being taken out of context and misused by other parties, and will make negotiations more cumbersome, increase related transaction costs, and may lead to miscommunications during negotiations. These problems threaten to undermine the interest of the public, government, and my clients in achieving an expeditious and environmentally protective resolution concerning the RD AOC and SOW. Releasing confidential settlement communications here could create additional harm by chilling other parties' willingness to engage with the government proactively to settle complex Superfund and other enforcement matters.

In these regards, the communications regarding the RD AOC and SOW represent a very narrow class of materials that are properly withheld under FOIA without undermining the Agency's implementation of FOIA generally or running afoul or FOIA law or policy. Principles of FOIA law require a careful balancing of potential harm of an interest protected under FOIA exemptions caused by a disclosure under FOIA.[11] In a nutshell, we believe that records relating to settlement communications with Region 2 regarding the RD AOC and SOW can be "walled off," at least temporarily, as a matter a FOIA practice for the unique reasons discussed above, such that the Obama Administration's articulated policy goals for FOIA implementation are still upheld.

Path Forward

We recognize the need to keep negotiations moving and believe that further discussion of these issues relating to FOIA is warranted to be able to move forward constructively on discussions regarding the RD AOC and SOW. Given the technical complexity of the issues related to the RD AOC we are not convinced that it is feasible to limit written communications between the parties. Rather, we would like to clarify the treatment of these communications under FOIA with the Region and explore a confidentiality

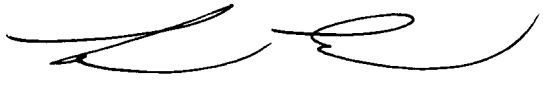
[11] See John Doe Agency v. John Doe Corp., 493 U.S. 146, 152 (1989) ("Congress sought 'to reach a workable balance between the right of the public to know and the need of the Government to keep information in confidence'" (citing H.R. Rep. No. 1497, at 6 (1966)); see also NARA v. Favish, 541 U.S. 157, 172 (2004) (while under FOIA government information "belongs to citizens to do with as they choose," this is balanced against statutory "limitations that compete with general interest in disclosure, and that, in appropriate cases, can overcome it").

agreement or similar mechanism to safeguard the confidentiality of records related to settlement communications between the parties.

Finally, to reiterate, the settlement communications that we believe should enjoy at least some measure of temporary protection, are only those communications during the negotiation period between my clients (or such communications made on their behalf) and the applicable government entities solely related to negotiation of an agreement(s) for the funding and/or performance of the OU-2 Remedial Design. We are not seeking to protect communications regarding other "major parties" responsible for COCs accepting to participate in the funding and/or performance of the OU-2 Remedial Design PRP Group that we are working to form.

Thank you for your consideration of our position. I am available to discuss this letter at your convenience.

Very truly yours,



Benjamin S. Lippard

cc: Sarah P. Flannigan, USEPA